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Consolidated report on extractive industries and their impact on indigenous peoples

Note by the Secretariat

Pursuant to a decision of the Permanent Forum on Indigenous Issues at its eleventh session (see E/2012/43, para. 107), Saúl Vicente Vázquez, a member of the Forum, prepared a consolidated report on extractive industries and their impact on indigenous peoples. The report is hereby transmitted to the Forum at its twelfth session.

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Consolidated report on the extractive industries and their impact on indigenous peoples

I. Relationship of indigenous peoples to their lands and their concept of development

1. In response to the demands of indigenous peoples concerning what they consider to be violations of their individual and collective human rights by international corporations, the Permanent Forum has conducted studies and expert workshops and, in its reports, has submitted recommendations on the extractive industries and their impact on indigenous peoples and their lands, territories and natural resources. At its seventh session in 2008, the Permanent Forum appointed three special rapporteurs to prepare reports on corporations and indigenous peoples, to be transmitted to the Forum at its eighth session. The Permanent Forum also decided to authorize an international expert group workshop on the extractive industries.

2. In his report,[1] Carlos Mamani Condori, a Permanent Forum member, highlights the fact that, since pre-Hispanic times, indigenous peoples have revered the land and worshipped it as Mother Earth. All living beings are brothers on Mother Earth, which is our living space and supports our collective existence. It is therefore essential to maintain a relationship of social and ecological harmony and balance with the earth.

> Every part of this earth is sacred to my people. Every shining pine bush, every grain of sand on the beaches, every mist in the dark woods, every hill and humming insect is holy in the memory and experience of my people. The sap which courses through the trees carries the memories of the red man.[2]

3. Indigenous peoples have maintained this relationship with the earth to this day; it is part of the worldview embedded in their cultures. In their reports, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people and a Permanent Forum member note that indigenous peoples live mainly in rural environments, in their customary territories, where they have been able to maintain, and continue to maintain, their traditional community lifestyle in those areas in which they live that have been spared major upheavals resulting from rapid economic and ecological transformations.[3]

4. According to the Forum member, this philosophy of life, which is essential to indigenous peoples, has never held any importance for corporations, Governments or multilateral financing institutions; this is evident from the fast-paced consumption of natural resources and the impacts of globalization that we see today.

5. This disparaging and discriminatory attitude towards the lifestyles of indigenous peoples explains why Governments have recently been turning their attention to so-called "undeveloped areas" with a view to extracting natural resources. Protected by an invisible veil of complicity, in the name of what they

[1] See E/C.19/2009/CRP.14.

[2] This sentiment was expressed by Chief Noah Sealth in a letter he wrote to Franklin Pierce, President of the United States of America, upon being threatened with the sale of his territories.

[3] E/CN.4/2003/90, para. 7, and E/C.19/2009/CRP.11, para. 9.

refer to as "development", they continually violate the human rights of indigenous peoples,[4] which are recognized in international instruments and national legislation.

6. Such actions, which are generally justified on the grounds of, among other objectives, poverty reduction and job creation, give silent assent to the increasing pressure placed on resources found in the lands and territories of indigenous peoples, who, disproportionately and to their detriment, bear the large-scale costs generated by extractive industries and other industries that consume resources, as well as by mining activities; the exploitation of petroleum and gas; large dams and hydroelectric plants; infrastructure projects; the tourist industry; the exploitation of forests; the agricultural, biotechnology and pharmaceutical industries; fisheries; the construction of toxic landfills; and the production of biofuel, among other activities.[5]

II. Impact of the extractive industries on indigenous peoples, their lands, territories and resources

7. The history of indigenous peoples' relationship to corporations, and extractive industries in particular, has remained unchanged since colonial times; the process of plundering, destruction and genocide of indigenous peoples during this period has been documented. As noted by a member of the Permanent Forum, "the colonial project turned into mass genocide. The native peoples of the American continent, to cite the prime example, were decimated in order to satisfy the greed[6] for precious metals, pearls, and so on. The native population decreased dramatically from the time the invasion began in 1492 to the early 1600s (17th century). Genocide as a consequence of extraction became a constant."[7]

8. Currently, as indicated by the Permanent Forum member in her report:

> The indigenous peoples of the world continue to suffer grave human rights violations. In recent years, there has been more and more evidence of the constant pressure placed on their territories as a result of exploitation of timber, minerals, water and hydrocarbons and by the agriculture, livestock, fishing, biofuel, pharmaceutical and cosmetic industries; an element common to all of these companies' activities is the expulsion and displacement of indigenous peoples from their lands. There have even been cases of dispossession, with companies taking advantage of the geographical locations of indigenous communities, their high rates of illiteracy and their monolingualism.[7]

9. The three United Nations mechanisms with specific mandates regarding indigenous peoples agree and are concerned by the fact that there are plans to extract natural resources, in particular minerals, petroleum and gas, from the

[4] See "Los Pueblos Indígenas y sus Derechos", Rodolfo Stavenhagen. Informes Temáticos del Relator Especial sobre la situación de los Derechos Humanos y las Libertades Fundamentales de los Pueblos Indígenas del Consejo de Derechos Humanos de la Organización de las Naciones Unidas (collection of reports by the United Nations Human Rights Council's Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people), United Nations Educational, Scientific and Cultural Organization (UNESCO), Mexico.

[5] E/C.19/2009/CRP.11, paras. 9-11.

[6] The Spanish word *angurria* (greed) used in the original text is gaucho or Argentine in origin.

[7] See E/C.19/2009/CRP.11.

majority of indigenous territories.[8] The term "extractive industries" includes transnational corporations, States, public and private corporations, companies and other entities participating in the exploration and extraction of natural resources.[9]

10. With regard to mining, the Permanent Forum member draws attention to the case of the Shoshone indigenous people,[10] documented in 2008, which involves the third largest gold-producing area in the world. Many companies registered in Canada, including Bravo Venture Group, Nevada Pacific Gold, Barrick Gold, Glamis Gold, Great Basin Gold, and U.S. Gold Corp, are operating in the area. In the case of the Shoshone indigenous people, the activities of mining companies led to impacts such as groundwater loss, environmental pollution and the destruction of cultural sites.[11]

11. With regard to hydrocarbons, the Forum member cites the case of the Nenets people. In Russia, 92 per cent of gas and 14 per cent of petroleum is extracted from the territory of the Nenets indigenous people,[12] a nomad culture that has roamed the tundra of north-eastern Europe and north-eastern Siberia for millennia. Today, this lifestyle is in serious jeopardy, owing to the contamination of soil and grazing areas for reindeer herds. The extraction project was ameliorated in 2008, when an agreement was signed between the local Nenets organization and the company Novatek.[13]

12. Carlos Mamani Condori, a Permanent Forum member, cites examples of problems with extractive industries in Peru:

- In Cerro de Pasco, the company Volcán is expanding the open-cast mine, which will have a detrimental effect on urban areas, as waste rock and tailings are dumped on communal lands, resulting in the displacement of both urban settlements and indigenous communities.
- The company Doe Run Perú operates one of the largest smelters in the region, which is located in the metropolitan area of the city of Oroya. The metallurgical complex produces 1,070 cubic metres of toxic smoke daily, which contains 15 metals that are hazardous to health, including sulphur dioxide, a highly polluting gas. The high levels of lead and sulphur have grave health effects and contaminate the soil and water supply. This company recently received State bailout funds and was granted a moratorium on implementing environmental regulations.

13. The Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people provides several examples of the effects that large development projects have had on the rights of indigenous peoples, highlighting the following:

> Serious issues regarding the non-recognition of, and failure to respect, the rights of indigenous and tribal peoples have been reported in Suriname.

[8] A/HRC/18/35, para. 22; E/C.19/2009/CRP.14; E/C.19/2012/3, para. 2; A/HRC/EMRIP/2010/2, para. 34.

[9] E/C.19/2009/CRP.8, paras. 8 and 11.

[10] See www.minesandcommunities.org/article.php?a=8766.

[11] E/C.19/2009/CRP.11, para.17.

[12] See http://www.ecologiablog.com/post/514/pueblo-nenet-en-siberia-amenazado-por-el-gas-y-el-petroleo — Nenets people in Siberia threatened by gas and petroleum.

[13] A/HRC/EMRIP/2009/5, para. 6.

> Indigenous and tribal peoples (Maroons), who together number about 75,000 persons, or about 14 per cent of the total population, occupy the forested areas of the "interior" and suffer various types of discrimination in the national society. (...) Various indigenous and Maroon communities have been affected by mining (gold and bauxite) and logging activities carried out by national and foreign companies, without their prior consent or participation.[14]
>
> (...) Thousands of families of the Santhal Adivasi people in the Jharkhand province of India have reportedly been displaced as a result of extraction of minerals without proper compensation or economic security.[15]
>
> (...) The Keiyo indigenous people in Kenya also reported that they have been forcibly evicted from their land without compensation, because of mining activity there.[16]

III. International legal framework on human rights and indigenous peoples

14. Over the past 20 years, the rights of indigenous peoples have gained prominence in the field of international human rights and the three mechanisms recognize that those rights are affirmed in a large number of legal instruments.

15. The Permanent Forum member considers the following instruments to be part of that legal framework: the Universal Declaration of Human Rights of 1948, the International Labour Organization (ILO) Indigenous and Tribal Populations Convention of 1957 (ILO Convention No. 107), the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights, which entered into force in March 1976. Other international legal instruments relevant to the rights of indigenous peoples include the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child, and the Convention on Biological Diversity; paragraph 20 of the Vienna Declaration and Programme of Action adopted at the World Conference on Human Rights in 1993 is also relevant.[17] Permanent Forum member Carlos Mamani Condori adds to this list the Declaration on Permanent Sovereignty over Natural Resources.

16. Other legal instruments that safeguard the rights of indigenous peoples include: general recommendation No. 23 of the Committee on the Elimination of Racial Discrimination, concerning indigenous peoples; the Universal Declaration on Cultural Diversity of 2001; and the 2001 working paper entitled "UNDP and Indigenous Peoples: A Policy Of Engagement", which est lishes United Nations Development Programme (UNDP) guidelines.[18]

17. The Expert Mechanism on the Rights of Indigenous Peoples adds the following instruments to the list above: the Convention on the Elimination of All Forms of Discrimination against Women; general comments Nos. 20 and 21 of the

[14] E/CN.4/2003/90, para. 21.
[15] Ibid., para. 22.
[16] Ibid., para. 23.
[17] E/C.19/2012/3, paras. 16 and 18.
[18] Ibid., para. 18.

Committee on Economic, Social and Cultural Rights; general comment No. 25 of the Human Rights Committee; decisions of the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights; and the African Charter on Human and Peoples' Rights.[19]

18. The experts believe the ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 69) and the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration) to be the legal instruments that best articulate the rights of indigenous peoples. The Declaration is considered to be the recognition of those peoples' historical demands for a legal instrument to protect their rights; it is the framework that sets out the minimum standards to ensure their dignity, survival and well-being.

IV. Self-determination, participation, consultation and free, prior and informed consent

Self-determination

19. The mechanisms reiterated that the most important right for the indigenous peoples is that of free determination, as without the enjoyment of that right, they could not enjoy the other fundamental human rights of indigenous peoples.[20]

20. The right to free determination is stated in the shared article 1 of the two international human rights covenants of 1966 and in article 3 of the Declaration. By virtue of that right, indigenous peoples may freely determine their political status and freely pursue their economic, social and cultural development.[21]

21. To determine their political status, and to pursue their development, they need to have recognition of their living space: that is, the territory. As established by article 26 of the Declaration, indigenous peoples have "the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use".

22. It is clear from the above that indigenous peoples have political and legal systems with jurisdiction over their territory, and that companies and States should take those systems into account before implementing any project, including extractive industry projects, that might affect indigenous peoples in any way.[1]

23. In addition to the above, the Expert Mechanism points out that "indigenous peoples have the right to make their own independent decisions through which they determine their own political status and pursue their economic, social and cultural development. Self-determination is an ongoing process which ensures the continuance of indigenous peoples' participation in decision-making and control over their own destinies".[22]

[19] A/HRC/EMRIP/2010/2, paras. 11, 13-16 and 36.
[20] Ibid., para. 2, and E/C.19/2009/CRP.14.
[21] General Assembly resolution 61/295.
[22] A/HRC/EMRIP/2010/2, para. 31.

Participation and consultation

24. In that connection, the Expert Mechanism notes in its study that "the Declaration contains more than 20 provisions affirming indigenous peoples' right to participate in decision-making".[23]

25. The Expert Mechanism also clarifies that:

> Importantly, the Declaration distinguishes between internal and external decision-making processes. Thus, indigenous peoples have the right to autonomy or self-government over their internal or local affairs (art. 4), as well as the right to participate fully, if they so choose, in the political, economic, social and cultural life of the State (art. 5), and to participate in all decisions affecting them or their rights (arts. 18 and 19). In other words, the Declaration affirms indigenous peoples' rights to develop and maintain their own decision-making institutions and authority parallel to their right to participate in external decision-making processes and the political order of the State.[24]

The Expert Mechanism also emphasizes the State's obligation "to consult indigenous peoples in matters that may affect them based on the principle of free, prior and informed consent".[25]

26. Internal decision-making processes, it submits, are evoked in article 27 of the International Covenant on Civil and Political Rights, whereas external processes are referred to in article 25 of that Covenant.[26]

27. ILO Convention No. 169 contains provisions for the full and effective consultation and participation of indigenous peoples and these rights, according to the Expert Mechanism, represent the cornerstone of the Convention.[27] It emphasizes the requirement that States institutionalize the procedures for participation (arts. 2 and 33) and notes that articles 6, 7 and 15 of the Convention provide the general framework for the consultation and participation of indigenous peoples.

28. For his part, the Special Rapporteur[28] emphasizes that States have the duty to consult with indigenous peoples; this statement is based on article 19 of the Declaration and specifically on its articles 10, 11, 15, 17, 19, 28, 29, 30, 32, 36 and 38. He also notes that the Convention affirms this right in article 6, paragraphs 1 and 2; article 15, paragraph 2; article 17, paragraph 2; article 22, paragraph 3; article 27, paragraph 3; and article 28. He also notes that this right is grounded in the International Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights.[29]

29. Many Governments have noted that it is difficult for them to hold consultations because the general nature of the aforementioned legal instruments would mean that consultations could be required at any time, which would create

[23] Ibid., para. 8.
[24] Ibid., para. 3.
[25] Ibid., para. 5.
[26] Ibid., paras. 9 and 12.
[27] Ibid., para. 17. See also: A/HRC/12/34, paras. 38 and 39.
[28] A/HRC/12/34, para. 38.
[29] Ibid., para. 40 and footnote 4, which refers to document CERD/C/51/Misc.13/Rev.4.

practical problems. However, the report of the Special Rapporteur clarifies the circumstances in which these consultations should be held:

> It applies whenever a State decision may affect indigenous peoples in ways not felt by others in society. Such a differentiated effect occurs when the interests or conditions of indigenous peoples that are particular to them are implicated in the decision, even when the decision may have a broader impact, as in the case of certain legislation. For example, land or resource use legislation may have broad application but, at the same time, may affect indigenous peoples' interests in particular ways because of their traditional land tenure or related cultural patterns, thus giving rise to the duty to consult.[30]

The Special Rapporteur also notes that consultation procedures are required in respect of State-owned resources located in the lands of indigenous peoples or of constitutional or legislative reform measures that affect a country's indigenous peoples.[31]

30. However, in the case of measures that affect particular indigenous peoples or communities, such as natural resource extraction projects, consultation procedures and active engagement with the affected communities will be required.[32] In these cases, the consent of the affected communities must be obtained.

Free, prior and informed consent

31. The Special Rapporteur notes that article 19 of the Declaration establishes that consultations with indigenous peoples are to be carried out in good faith in order to obtain their free, prior and informed consent, that is, consent should be the final objective of the consultation. The Declaration, in article 10 and article 29, paragraph 2, also affirms the State's obligation to obtain consent for any project that would result in the relocation of a group from its traditional lands or the storage of hazardous materials or wastes in the lands of indigenous peoples.[33]

32. According to the Expert Mechanism, the principle of consent establishes the framework for prior consultations, project acceptance and negotiations pertaining to benefit-sharing. This consent must be obtained, in particular, for projects relating to natural resource extraction, or the creation of natural parks, forest reserves or game reserves in indigenous peoples' lands and territories.[34]

33. The Expert Mechanism also notes that some of the treaty bodies have clarified the responsibility of States to obtain and respect the consent of indigenous peoples in connection with extractive industries.[35] The Akwé: Kon guidelines for the implementation of article 8 (j) of the Convention on Biological Diversity also

[30] A/HRC/12/34, para. 43.

[31] Ibid., paras. 44 and 45.

[32] Ibid., para. 45.

[33] Ibid., paras. 46 and 47.

[34] A/HRC/EMRIP/2010/2, para. 34. See also Cathal Doyle, "Free prior informed consent: a universal norm and framework for consultation and benefit sharing in relation to indigenous peoples and the extractive sector", prepared for a workshop on extractive industries, indigenous peoples and human rights, organized by the Office of the United Nations High Commissioner for Human Rights, Moscow, 3 and 4 December 2008.

[35] Committee on the Elimination of Racial Discrimination (CERD/C/RUS/CO/19 and CERD/C/62/CO/2); and Committee on Economic, Social and Cultural Rights (general comment No. 21 (E/C.12/GC/21), para. 37, E/C.12/1/Add.100, para. 12 and E/C.12/1/Add.74, para. 12).

recognize the importance of consent for the protection of the traditional knowledge of indigenous peoples.[36]

34. At the regional level, the Expert Mechanism adds, the judgement of the Inter-American Court of Human Rights in the case *Saramaka People v. Suriname* referred to the State's duty to consult with and obtain the consent of the Saramakas.[37]

35. The Expert Mechanism also notes that international financial institutions have recognized the importance of consent in projects involving the development of the natural resources of indigenous peoples: for instance, in the environmental policy of the European Bank for Reconstruction and Development and the Safeguard Policy of the Asian Development Bank.[38]

V. Responsibility and role of States, companies and corporations for extractive industries

36. It is clear from the previous chapter that States have the duty to consult, ensure participation and obtain the free, prior and informed consent of indigenous peoples. Without prejudice to that statement, the three mechanisms have expressed their concern at the large number of companies that have been establishing themselves in recent years in the territories of indigenous peoples and at the resulting level of conflict between the companies and those peoples; the companies exploit the natural resources, violate individual and collective rights and in many cases deprive the peoples of their lands and natural resources. The mechanisms therefore draw attention to the need for regulatory frameworks for the activities of such companies in the territories of indigenous peoples.

37. The member of the Permanent Forum states that:

> The number of transnational corporations engaging in resource exploitation is rising, and they have to begin implementing standards of social responsibility within their projects. At the same time, Governments also need to utilize international standards to guarantee the rights of indigenous peoples at a national level.
>
> (...)
>
> According to the most recent figures, 77,000 transnational firms span the global economy today, with some 770,000 subsidiaries and millions of suppliers. Transnational corporations lead operations in more States than ever before, and increasingly in socio-political contexts that pose entirely new human rights issues for them.[39]

38. According to the Special Rapporteur, although there is no legal framework concerning corporate responsibility with respect to human rights, a general debate

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[36] Available from: www.cbd.int/doc/publications/akwe-brochure-en.pdf.

[37] Case of the *Saramaka People v. Suriname*, series C, No. 172, 28 November 2007, para. 134.

[38] A/HRC/EMRIP/2010/2, paras. 36-40. See also: European Bank for Reconstruction and Development, Environmental and Social Policy, May 2008, available from www.ebrd.com/about/policies/enviro/policy/2008policy.pdf; and Asian Development Bank, The Safeguard Policy Statement (second draft), October 2008, pp. 11, 12 and 19.

[39] E/C.19/2012/3, paras. 1 and 25. See also United Nations Conference on Trade and Development, *World Investment Report 2006*, available from: www.unctad.org/en/docs/wir2006_en.pdf.

on the subject of companies and their relationship to human rights is currently taking place; he also states that this debate should include corporate responsibility with regard to indigenous peoples. The debate emphasizes that corporate responsibility in relation to human rights is somewhat different from State responsibility. In that connection, he notes: "Indeed, the conceptual framework drawn up by the Special Representative of the Secretary-General distinguishes between three types of duties: the State duty to protect, the corporate responsibility to respect and the shared responsibility to remedy".[40]

39. That is, it is for the State to protect against potential human rights abuses by business entities, including transnational corporations, while companies have the obligation to respect international human rights standards within the framework of their "due diligence".[41]

40. In addition, as noted by the expert from the Permanent Forum, corporations sometimes have more power than Governments to affect the realization and protection of rights and should therefore bear responsibility for the rights that they may impact, including the right to free, prior and informed consent.

41. Due diligence, notes the Special Rapporteur, applies to three sets of factors: the country context in which a company's business activities take place; the human rights impact those activities may have within that context; and whether the company might contribute to abuse through relationships connected to its activities. These aspects are reflected in the United Nations Global Compact, the most important international initiative to date aimed at ensuring corporate social responsibility. Principles 1 and 2 of the Global Compact state that businesses should support and respect the protection of human rights.[42]

42. With regard to the rights of indigenous peoples, notes the Special Rapporteur, some institutions and initiatives have more developed regulatory or self-regulatory frameworks governing responsibility. This is the case of the International Finance Corporation of the World Bank and various corporate social responsibility initiatives, such as the Principles and Criteria for Forest Management, the Global Reporting Initiative and the International Council on Mining and Metals, which have developed criteria, standards or policies relating to the rights of indigenous peoples.[43]

43. In addition, as noted by the Special Rapporteur, due diligence "is not limited to respect for the domestic regulations of States in which companies operate, which are inadequate in many cases, but should be governed by the international standards that are binding on those States and on the international community as a whole".[44] Although, as the expert from the Permanent Forum notes, the only difference is that States' duties would be primary and corporations' duties secondary. In addition, John Ruggie, the former Special Representative of the Secretary-General on the issue of human rights and transnational corporations and othe business enterprises, believes that the boundaries within which corporations' secondary duties would take

[40] A.HRC/15/37, para. 34. See also E/CN.4/2006/97, paras. 56-69, A/HRC/4/35 and A/HRC/8/5.

[41] A/HRC/4/35, paras. 10-18, and A/HRC/8/16.

[42] A/HRC/15/37, paras. 36 to 38. See also: www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html.

[43] A/HRC/15/37, paras. 41 to 43.

[44] Ibid., para. 47. See also: A/HRC/8/5, para. 54. Cited by the Special Rapporteur.

effect remain unknown,[45] so that their responsibilities will continue to depend on the capacities of States. However, companies are expected to assume their responsibilities to respect the rights of indigenous peoples, independently of the efforts made by States.

VI. Good practices

44. The international framework of indigenous peoples' rights, especially ILO Convention No. 169 and the Declaration, together with the corporate regulatory or self-regulatory framework for indigenous rights, has raised the awareness of Governments, extractive industries and indigenous peoples concerning the need for mechanisms that will lead to better mutual understandings.

45. These understandings have been called "good practices". In its study,[46] the Expert Mechanism considers the following factors to be indicative of "good practice".

46. Good practice allows for the full participation of indigenous peoples in the design of decision-making processes; it allows for and enhances indigenous peoples' participation in decision-making; it allows indigenous peoples to influence the outcome of decisions that affect them; it realizes indigenous peoples' right to self-determination; and it includes, as appropriate, robust consultation procedures and/or processes to seek indigenous peoples' free, prior and informed consent.

47. The mechanisms have documented a number of cases of good practice. In 2008, the Office of the United Nations High Commissioner for Human Rights organized an international workshop on natural resource companies, indigenous peoples and human rights, and setting a framework for consultation, benefit-sharing and dispute resolution.[47]

48. The first concerned Novatek, the second largest natural gas company in the Russian Federation, which has operations in the Yamal-Nenets Autonomous Area. Indigenous representatives indicated that until the year 2000, the company's extractive activities had had a negative impact on the environment and on indigenous peoples' livelihoods. Thanks to the intervention of the governor, local authorities and the goodwill of business, together with the presence of the International Finance Corporation, in 2008 a mutually advantageous agreement had been reached for the extraction activities, including consent procedures, the maintenance of traditional livelihoods and job creation by the company.[48]

49. Court judgements in favour of the indigenous Nama people in Richtersveld, South Africa, have been documented. In this case, the Constitutional Court found in 2003 that the Nama community owned the diamonds and land that had previously been declared Crown lands and subsequently passed on to private companies. It found that South African law made provision for communal ownership and, therefore, the Richtersveld community was entitled to restitution of the lands and minerals and to compensation.

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[45] See A/HRC/EMRIP/2011/2, para. 30.

[46] A/HRC/EMRIP/2011/2, para. 13.

[47] A/HRC/EMRIP/2009/5.

[48] Ibid., paras. 6 to 8.

50. In 2007, through a settlement agreement signed by the Government, Alexkor Ltd. and the Nama community, 84,000 hectares of land were restored to the community and it received a 49 per cent share of equity of the company's operations in that area and 19 million dollars in reparations.[49]

51. The mechanisms have also documented cases of good practices in which consultation, participation and free, prior and informed consent procedures were established for authorities, businesses and indigenous peoples, through legislative mechanisms.

52. The Expert Mechanism documented the case of the Democratic Republic of the Congo where, with the participation of and through consultations with indigenous peoples themselves, Congolese and international non-governmental organizations, United Nations agencies and Congolese public institutions, in 2010 the Law on the Promotion and Protection of the Rights of Indigenous Peoples was passed. Under the law, consultation with indigenous peoples is generally mandated when there is the consideration, formulation or implementation of any legislative, administrative or programmatic measure that may affect indigenous peoples and is required in relation to measures that affect indigenous lands or resources or the establishment of protected areas that may affect their way of life. Consultations must be conducted in good faith with a view to obtaining the free, prior and informed consent of the concerned indigenous peoples.[50]

53. In the case of Australia, the Expert Mechanism documented that under the Aboriginal Land Rights (Northern Territory) Act of 1976, section 23AA, aboriginal land councils must "'give priority to the protection of the interests of traditional aboriginal owners of, and other aboriginals interested in, Aboriginal land in the area of the Council' and 'promote effective consultation with the traditional Aboriginal owners of, and other Aboriginals interested in, Aboriginal land in the area of the Council'. Under section 45, a mining interest may not be granted in respect of Aboriginal land unless an agreement has been reached between the Aboriginal land council and the intending miner."[51]

VII. Conclusions and recommendations

54. In these seven chapters, I have consolidated the reports and studies prepared by the three United Nations mechanisms with specific mandates relating to the rights of indigenous peoples. The reports and studies give rise to the following conclusions and recommendations:

(a) Ongoing efforts at coordination among the three mechanisms should be strengthened and consolidated into a permanent feature of their work both jointly and separately.

(b) The concept of development of indigenous peoples should be considered a contribution to resolving current crises because "indigenous peoples' concept of development is based on a philosophy, underpinned by the values of reciprocity, solidarity, equilibrium and collectivity, that humans should live within the limits of

[49] Ibid., paras. 17 and 18.
[50] A/HRC/EMRIP/2011/2, para. 56.
[51] Ibid., para. 70.

the natural world. Development with culture and identity is characterized by a holistic approach that seeks to build on collective rights, security and greater control and self-governance of lands, territories and resources. It builds on tradition with respect for ancestors, but also looks forward". It is therefore recommended that, in future, words and concepts that are more in line with indigenous thought, such as *sumak kawsay* and *alli kawsay* (which mean "living well") are used.[52]

(c) International legal instruments must be applied. These include the Declaration and ILO Convention No. 169, as well as the case law and general comments of the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, the Committee on Economic, Social and Cultural Rights, the decisions of the Inter-American Court of Human Rights and the United Nations Development Group Guidelines,[53] because they support development with culture and identity for indigenous peoples.

(d) Indicators of culture, spirituality, sustainability and well-being should also be prepared as inputs to create indices of the well-being of indigenous peoples.

(e) Networks of indigenous peoples' educational institutions and universities should be strengthened to support culturally appropriate education and to strengthen and revitalize indigenous languages, as part of the development with identity of indigenous peoples.

55. The three mechanisms acknowledge that the negative and even catastrophic impact of extractive industries in or near to indigenous territories is one of the greatest concerns of indigenous peoples and one of the greatest challenges to the realization of their individual and collective rights.

56. They also conclude that respect for the rights of indigenous peoples to their lands, territories and resources must serve as the foundation for the relationship between indigenous peoples, Governments and the extractive industries.

57. They acknowledge that indigenous peoples share the belief that States and businesses have little interest in defending and respecting their human rights.

58. Indigenous peoples fear for their safety owing to the violence to which they are subjected as intimidation and harassment and to force them to accept the projects and decisions of outside interests without their consent.

59. They agree that, as a result of and in response to the attacks they have suffered, indigenous peoples have taken action and mobilized, establishing subregional organizations as an alternative means of defending their rights, and they have expressed their concerns to international bodies, often as a result of the lack of appropriate forums in their own countries.

60. The three mechanisms also reached the important conclusion that indigenous communities and peoples are not opposed to State corporations, industries and projects, but they are against the plunder of their territories, the lack of recognition of their customary possession of their lands and the violation of their own ways of life.

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[52] E/C.19/2010/14, para. 22.

[53] See www.undp.org/partners/eso/indigenous.shtml, 2008.

61. They recommend the provision of compensation and restitution for damages inflicted upon the lands, territories and resources of indigenous peoples.

62. They recommend that indigenous communities should be considered the owners of their land and territory, regardless of whether those rights are recognized by Governments.

63. They further recommend the establishment of mechanisms for dialogue and negotiation between Governments, companies and indigenous peoples on an equal basis.

64. The rights of indigenous peoples have gained prominence in the field of international human rights and the three mechanisms recognize that those rights are affirmed in a large number of legal instruments.

65. The experts believe the ILO Convention No. 169 and the Declaration to be the legal instruments that best articulate the rights of indigenous peoples. The Declaration is considered to be the recognition of those peoples' historical demands for a legal instrument to protect their rights; it is the framework that sets out the minimum standards to ensure their dignity, survival and well-being.

Recommendations for States

66. Adopt the Declaration and ratify ILO Convention No. 169 and, for those States that have already done so, implement the rights set out in those instruments and respect the right of indigenous peoples to self-determination.

67. Revise any laws, policies and structures relating to extractive industries that are harmful to indigenous peoples and ensure compliance with the Declaration and other international instruments that protect the rights of indigenous peoples.

68. Ensure that legislation on the granting of concessions includes provisions on consultation and free, prior and informed consent in accordance with international human rights standards.

69. Develop consultation instruments and methodology with the participation of indigenous peoples and implement these procedures with their full participation in accordance with their forms of organization at different levels.

70. Adopt effective measures to ensure environmental, social and cultural monitoring, as well as appropriate labour conditions, community protection and the review of operations, as well as their possible suspension, in the event of threats to indigenous peoples' communities.

71. Improve indigenous communities' access to information and to the judicial system and reform the legal system in cases where access to legal remedy is not available.

72. Ensure that companies, their regulatory authorities and certification bodies incorporate the rights of indigenous peoples in their quality standards and operational, business and investment plans.

73. Verify that extractive industry corporations and companies adopt the Declaration and respect the rights recognized therein, regardless of whether the Government of the country in which their business is located recognizes the human and indigenous rights concerned.

74. All actors, Governments and national and transnational corporations should recognize the rights of indigenous peoples over their lands as the basis for negotiations on extractive industry projects, as well as for the purposes of drawing up partnership contracts and ensuring that financial benefits are shared.

75. Carry out assessments to determine the impact of all extractive industry projects affecting indigenous peoples on their economic, social and cultural rights.

76. Ensure the full participation of indigenous peoples in the design, execution and evaluation of development projects at the national, regional and local levels.

77. In accordance with the Declaration and with ILO Convention No. 169, States have a duty to consult with indigenous peoples through special, differentiated procedures in matters affecting them, with the objective of obtaining their free, prior and informed consent.

78. States have a duty to obtain indigenous peoples' consent in relation to decisions that are of fundamental importance for their rights, survival, dignity and well-being.

79. States, international organizations, indigenous peoples and other decision-making entities should facilitate the participation of indigenous women in their activities and increase their access to address difficulties facing indigenous women seeking to participate in decision-making.

80. States should ensure that indigenous peoples have means for financing their autonomous functions, in accordance with article 4 of the United Nations Declaration on the Rights of Indigenous Peoples.

81. States should recognize that the right to self-determination of indigenous peoples constitutes a duty for States to obtain indigenous peoples' free, prior and informed consent, not merely to be involved in decision-making processes, but a right to determine their outcomes.

82. The duty to consult applies whenever a legislative or administrative decision may affect indigenous peoples. The objective of the consultation should be to obtain the consent or agreement of the indigenous peoples concerned.

83. Indigenous peoples should also seek in good faith to reach consensus on proposed measures and avoid inflexible positions when the proposed measures are based on legitimate public interests.

84. Relevant agencies and programmes within the United Nations system, as well as concerned non-governmental organizations, should develop ways to provide indigenous peoples with access to the technical capacity and financial resources they need to effectively participate in consultations and related negotiations.

85. Private companies that operate or seek to operate on or in proximity to indigenous lands should adopt codes of conduct that bind them to respect indigenous peoples' rights in accordance with relevant international instruments, in particular the United Nations Declaration on the Rights of Indigenous Peoples.

86. ILO should enable effective representation by indigenous peoples in its decision-making, and especially with regard to the implementation and supervision of ILO Conventions and policies relevant to indigenous peoples.

87. The United Nations system should, in accordance with the Declaration, establish a permanent mechanism or system for consultations with indigenous peoples' governance bodies, including indigenous parliaments, assemblies, councils or other bodies representing the indigenous peoples concerned, to ensure that such bodies have a consultative status enabling them to participate effectively at all levels of the United Nations.

88. It is concluded that the implementation of corporate activities without taking account of the rights of indigenous peoples, as they are recognized under international rules, has given rise to highly negative impacts on the environment and the economic, social, cultural and spiritual life of indigenous peoples.

89. Based on the guiding principles developed by the Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises — protect, respect and remedy — companies have, at the very least, the duty to comply with international standards relating to the human rights of indigenous peoples.

90. Companies must exercise due diligence by identifying legal, institutional or other factors that have an impact on the effective enjoyment of the rights of indigenous peoples in the countries in which such companies operate.

91. Companies must also grant, in all respects, full recognition of the indigenous territorial rights arising from customary land tenure, independent of official State recognition.

92. Companies must not attempt to replace Governments in situations where international standards require Governments to bear direct responsibility for holding consultations; indeed, they must promote the full assumption by Governments of such responsibility.

93. It is concluded that there is a growing degree of awareness and assumption of responsibility on the part of States and corporate actors. This growing awareness opens a historical opportunity for advancing towards a common normative understanding and the operationalization of indigenous peoples' rights and related institutional safeguards in the context of natural resource extraction and development projects in indigenous territories.

94. It is recommended that the Government of Mexico should consider the recommendations made in the study of the Permanent Forum expert, Saúl Vicente Vázquez, on the impact of the extractive industries on indigenous peoples in Mexico.